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April 15.

APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Spankie.

SHIB GOPAL AND OTHERS (DEFENDANTS) *v.* BALDEO SAHAI (PLAINTIFF).*

Act X of 1877 (Civil Procedure Code), s. 32—Dismissal or Addition of Parties—Revenue Court, Power of—Act XVIII of 1873 (N.-W. P. Rent Act), s. 106.

B and *N*, the mortagees of a mahal, granted the mortgagors a lease of the mahal, the mortgagors agreeing to pay "the mortgagees" a certain rent half yearly "on account of the right they held in equal shares," and that, in default of payment of such rent, "the mortgagees" should be entitled to sue for payment. The mortgagors having made default in payment of the rent, and *N* refusing to join in a suit against the mortgagors to enforce payment, *B* sued them alone for a moiety of the rent due. The Revenue Court of first instance held, with reference to s. 106 of Act XVIII of 1873, that *B* could not sue separately. *Held* by the High Court that the order of the Revenue Court of first appeal directing, *inter alia*, that the Court of first instance should retry the suit after making *N* a defendant in the suit was not illegal, notwithstanding that the provisions of s. 32 of Act X of 1877 were not made applicable to the procedure of the Revenue Courts by Act XVIII of 1873.

Held per SPANKIE, J, that s. 106 of Act XVIII of 1873 did not apply, and *B* was entitled separately to sue for the whole of the rent.

THE facts of this case are sufficiently stated for the purposes of this report in the judgments of the High Court.

Pandit *Nand Lal*, for the appellants.

Babu *Oprokash Chander Mukerji*, for the respondent.

The following judgments were delivered by the High Court:

PEARSON, J.—If s. 32 of Act X of 1877 had been declared to be applicable to the procedure of Revenue Courts, the lower appellate Court's order would have been fully warranted by the terms of its second clause. Merely by reason of the absence of any such declaration, or of similar provisions in the Rent Act of 1873, I am not prepared to hold the order to be illegal. It is a reasonable, equitable order, consonant to judicial practice, conducive to the ends of justice, and not repugnant to anything in Act XVIII of 1873. I would dismiss the appeal with costs.

* Appeal, No. 60 of 1878, from an order of R. M. King, Esq., Judge of Meerut, dated the 28th May, 1878.

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SPANKIE, J.—The plaintiff is a joint mortgagee of the shares of the defendants, the mortgagors, in an undivided estate. The mortgagees leased the estate to the mortgagors, taking from them a counterpart of lease dated 24th April, 1877, the date apparently of the mortgage. By the terms of the lease the mortgagors were to pay Rs. 357 to the mortgagees, half at the *kharif* and half at the *rabi* yearly, on account of the right they held in equal shares. The suit is brought by one mortgagee for half the rent due in respect of 1283 fasli and 1284 fasli. The defendants contend that plaintiff is a co-sharer in an undivided estate, and has never collected rent separately: he is barred from suing separately by s. 106 of Act XVIII of 1873.

The Assistant Collector holds that the case turns on the terms of the counterpart of the lease: this document recites that defendants take over from Mangat Rai and Baldeo Sahai certain lands, whereof Mangat Rai and Baldeo Sahai are possessed in equal shares, in consideration of the payment of Rs. 357 yearly, the former being liable for the Government demand: beyond these words there is no separation of the mortgagees: their relation to the farmers is a joint one: no one of them, the Assistant Collector holds, can sue for a share under a division which may obtain as between the mortgagees themselves: the plaint was informal and the suit must be dismissed.

In appeal the Judge considered that the plaintiff could get no redress unless the Court exercised its powers under s. 32 of Act X of 1877. "This being so," the Judge adds, "I think the Rent Court should have exercised its powers, and so conduced to the redress of what is certainly an injury suffered by the plaintiff, *viz.*, the non-realisation of his rent." He, therefore, remanded the case with direction that the plaintiff should have leave to amend his plaint, to pay additional institution fee, and request the Court to make Mangat Rai a co-defendant.

It is contended in second appeal that s. 106 of Act XVIII of 1873 bars the suit: the direction under s. 32 of Act X of 1877 to the first Court to amend the plaint and make Mangat Rai a party to the suit is wrong in law, as that section is expressly limited to the first hearing of the suit.

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S. 32 of Act X of 1877 operates in two ways. The Court on or before the first hearing, upon the application of either party, may order the name of any party, whether as plaintiff or as defendant, improperly joined, to be struck out; and it may at any time either upon or without such application, and on such terms as it thinks just, order any plaintiff to be made a defendant, or that any defendant may be made a plaintiff, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added. So that if s. 32 of the Act could be applied to the case before us, the objection taken by the appellant fails. No person, however, can be added as a plaintiff without his own consent thereto.

The present Rent Act, except so far as ss. 84, 148, 179, and 210 are concerned, has made no provision for adding parties. Nor did Act X of 1859 do so, except under ss. 77 and 140. But the Courts heretofore have always held themselves at liberty to exercise the power vested in them under s. 73 of Act VIII of 1859 in such cases as the one before us. The order of the Judge, I agree with my honorable and learned colleague, is one that is equitable and not repugnant to Act XVIII of 1873, whilst it is consonant to judicial practice and the ends of justice. In this particular case the plaintiff could have no redress unless he made the co-mortgagee a defendant in the suit. It is stated in the plaint that Mangat Rai had been invited to join in the suit and that he refused, being in league with the defendants. The plaintiff sent a registered letter to him asking him to join in the suit, but got no reply. Therefore the plaintiff was compelled to sue for his half share. If, however, s. 106 of the Rent Act applies to this case, the plaintiff should be instructed to sue for the entire share due, making the co-mortgagee a co-defendant. I, however, do not regard s. 106 as in any way operating to bar the suit. The property referred to in s. 106 is an undivided landed estate, and the co-sharer is the co-sharer in that estate, which is still the property of the mortgagors. It is true that the mortgagees represent the mortgagors as being in temporary proprietary possession of the property, but it is not in the character of a co-sharer in an undivided property that the plaintiff brought

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this suit. On the contrary, the terms of the lease show that though the mortgage was made to Baldeo Sahai and Mangat Rai, their shares in the mortgage were recognised by the mortgagors. Their shares were equal. It is true that it was provided that in case of default the mortgagees might bring a suit and realise the amount due. But there is the recognition by the lessees that under the terms of the mortgage-deed the plaintiff is entitled to half the sum payable under the lease, and on this account I think that the plaintiff was entitled to sue for his share of it. It may, however, be more strictly regular that he should sue for the whole sum due, making his co-mortgagee a defendant; and if this is the course which the lower appellate Court is pursuing, for his order is not very clear, I concur with Mr. Justice Pearson, and would dismiss the appeal with costs.

Appeal dismissed.

FULL BENCH.

April 16

Before Mr. Justice Pearson, Mr. Justice Spankie, and Mr. Justice Oldfield.

CHAMAILI KUAR (DEFENDANT) *v.* RAM PRASAD (PLAINTIFF) *

Hindu Law—Power of the Father to alienate Ancestral property.

F, during the minority of his son *R*, sold in order to raise money for immoral purposes, the ancestral property of the family. The purchaser acted in good faith and gave value for such property. *Held* by the majority of the Full Bench (SPANKIE, J., and OLDFIELD, J.), in a suit by *R* against the purchaser and *F* to recover such property and to have such sale set aside as invalid under Hindu law, that such sale was not valid even to the extent of *F's* share, and that *R* was entitled to recover such property as joint family property. *Held per* PEARSON, J., that *R* could not recover such property, and that the purchaser, having acted in good faith, took by the sale *F's* share in such property, and might have such share ascertained by partition.

THE plaintiff in this suit claimed to recover the possession of certain immoveable property, and to have a sale of such property, dated the 30th December, 1859, made by his father, Fateh Chand, set aside. He made his father a defendant in the suit, and he sued on the allegation that the sale was invalid, the property

* Second Appeal, No. 1068 of 1877, from a decree of W. Lane, Esq., Judge of Moradabad, dated the 18th July, 1877, reversing a decree of Maulvi Muhammad Wajih-ul-la Khan, Subordinate Judge of Moradabad, dated the 17th March, 1877.